No. 16013.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ABC PACKARD, INC.,

Appellant,

vs.

GENERAL MOTORS CORPORATION, a corporation,

Appellee.

APPELLANT'S REPLY BRIEF.

PACHT, ROSS, WARNE & BERNHARD,
STUART L. KADISON,
HARVEY M. GROSSMAN,
6535 Wilshire Boulevard,
Los Angeles 48, California,
PRESTON, THORGRIMSON & HOROWITZ,
CHARLES HOROWITZ,
1900 Northern Life Tower,
Seattle 1, Washington,
Attorneys for Appellant.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

TOPICAL INDEX

PAGE

Statement of position 1

Prefatory statement 1

I.

The basic error of the trial court lies in its failure to instruct the jury that General Motors owed Anderson, as a matter of law, a duty to disclose the policy 2

A. The brief of appellee to the contrary notwithstanding the basic issue on the appeal is whether General Motors owed Anderson, as a matter of law, a duty to disclose the policy 2

B. The special verdict, amply supported by the evidence, established all of the elements of plaintiff's claim other than the duty to disclose 3

1. Appellant is proceeding on a nondisclosure theory 3

2. The general and special verdicts do not have the effect claimed for them by appellee 5

II.

Appellant's right to recovery is not premised on contract, and the printed contracts do not bar recovery of a nondisclosure theory 12

III.

The trial court erred in taking appellant's right to recovery for Nash's 1947 misrepresentations from the jury 14

IV.

The trial court erred in making the nunc pro tunc order as to the costs of the transcript 14

V.

It is appellee rather than appellant that misstates the facts 15

Conclusion 24

TABLE OF AUTHORITIES CITED

Cases

	PAGE
E. H. Taylor, Jr. & Sons v. Julius Levin Co., 274 Fed. 275	10
Ikeda v. Curtis, 43 Wash. 2d 449, 261 P. 2d 684	4
Lincoln v. Keene, 51 Wash. 2d 171, 316 P. 2d 899	4
Smyth Sales, Inc. v. Petroleum Heat & Power Co., 128 F. 2d 697	10
United States v. General Motors Corporation, 121 F. 2d 376	11
Webster v. Romano, 178 Wash. 118, 34 P. 2d 428	3, 4

Rules

Rules of the United States Court of Appeals for the Ninth Circuit, Rule 56(f)	15

No. 16013.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ABC Packard, Inc.,

Appellant,

vs.

General Motors Corporation, a corporation,

Appellee.

APPELLANT'S REPLY BRIEF.

Statement of Position.

This is an appeal not on facts, but on a clearly defined question of law: the error of the trial court in submitting a question of law to the jury.

Prefatory Statement.

Notwithstanding the palpable attempt of appellee to warp this proceeding into an appeal on the facts, we believe it clear from the record and from our Opening Brief that the issue before the Court is essentially one of law. More particularly, the determination of this appeal turns upon the question whether the trial court erred in submitting to the jury the issue of the existence of a duty to disclose the General Motors distributorship termination policy (hereinafter referred to as "the policy").

Our principal purpose in this brief will be to place the appeal in its proper focus.

I.

The Basic Error of the Trial Court Lies in Its Failure to Instruct the Jury That General Motors Owed Anderson, as a Matter of Law, a Duty to Disclose the Policy.

A. The Brief of Appellee to the Contrary Notwithstanding, the Basic Issue on the Appeal Is Whether General Motors Owed Anderson, as a Matter of Law, a Duty to Disclose the Policy.

Throughout this action, from its earliest stages, appellant conceived the issue of the existence of the duty to disclose as one of law arising out of the relationship of the parties, and requested that the trial court resolve it as a matter of law. The trial court's refusal to do so constitutes the principal error noted in our Opening Brief.[1]

Rather than meet this issue squarely, on the law, counsel for appellee has attempted to convert the appeal, taken on this clear-cut proposition of law, into a dispute as to the facts, perhaps having in mind the difficulties of an appellant in attempting to persuade an appellate court to reverse on factual issues. As noted, *infra* (this Br. Point V), appellee relates "facts" based on isolated statements taken out of context, ignores the uncontradicted testimony of appellant's witnesses and the unfavorable testimony of its own witnesses, and harps on facts hav-

---

[1]The Court's attention is invited to the fact that the trial court, notwithstanding its failure to instruct on this issue as a matter of law, conceived the issue to be one of law, and so stated in the opinion read to the jury after the rendition of the verdict [T. 2474], where the Court stated: "The compulsive force of these agreements and of the action of the parties under them leads the court to conclude *as a matter of law* that the relationship between the parties was not such as . . . impelled the disclosure of any policy which indicated the ultimate and certain discontinuance at an indefinite date in the future of plaintiff's distributorship." (Emphasis added.)

ing no materiality to any of the issues in the case. These errors and omissions are, for present purposes, merely noted in passing, to be taken up later in this brief (*infra,* Point V).

Despite our reluctance to belabor what we believe to be the obvious, the essence of Anderson's position can be stated thus: *the relationship between the parties, as established by the uncontradicted evidence, was such that General Motors, and more particularly the key General Motors officials who devised and directed the execution of the policy, owed Anderson, as a matter of law, a duty to disclose the policy. From this it follows that the submission of this issue to the jury as a factual question constitutes reversible error.*

With a recognition that the foregoing states the principal issue on the appeal, it is of no moment that there were facts in the case as to which testimony was in conflict. Nonetheless, the brief of appellee is directed primarily and principally to such factual conflicts in a manifest effort, on the part of appellee, to transform the essential simple questions of law into questions of fact. Our purpose in the following portions of this brief is to place the appeal once more in proper focus.

B. The Special Verdict, Amply Supported by the Evidence, Established All of the Elements of Plaintiff's Claim Other Than the Duty to Disclose.

1. *Appellant Is Proceeding on a Nondisclosure Theory.*

It may be helpful at this point briefly to restate appellant's theory of the case. The action is not grounded on the classic misrepresentation theory, *cum* knowledge *cum* scienter *cum* fraudulent intent *cum* etc. as detailed in *Webster v. Romano* (178 Wash. 118-120, 121, 34 P. 2d 428, 430 [1934]), cited at page 39 of Appellee's Brief.

It is rather grounded on the existence of a policy (which the jury found to exist), its nondisclosure to appellant (a nondisclosure found by the jury) in the context of a duty, which existed as a matter of law, to make such disclosure. Plainly, the concept of "intent to defraud," labored mightily by appellee at pages 39-41 of its brief, has no bearing on the case. Clearly, one proceeding, as is appellant, on a nondisclosure theory, could hardly be expected to establish "a representation of an existing fact" in the sense of *Webster v. Romano, supra.* In *Ikeda v. Curtis,* 43 Wash. 2d 449, 261 P. 2d 684, 691 (1953), the court states as follows:

> "If appellants intentionally concealed some fact known to them, which it was material for respondents to know, that constituted a fraudulent concealment; that is, the concealment of a fact which one is bound to disclose is the equivalent of an indirect representation that such fact does not exist, . . ."

By the same token, it is only when a party is charged with *active concealment* that the question of fraudulent intent may assume importance. Thus, in *Lincoln v. Keene,* 51 Wash. 2d 171, 173-174, 316 P. 2d 899, 901 (1957), cited by appellee at page 41 of its brief, the court expressly states that it is setting forth ". . . the applicable general rules with reference to fraud by concealment . . ." No one questions that *Lincoln v. Keene, supra,* is good law; but it is clear that it is not applicable to this case.

Moreover, if we assume *arguendo* that fraudulent intent is an element in a nondisclosure case, it is clear that such intent may be inferred from the nondisclosure itself, as the trial court charged the jury without objection from appellee [T. 2408].

2. *The General and Special Verdicts Do Not Have the Effect Claimed for Them by Appellee.*

Appellee makes numerous unwarranted assumptions as to the effect of the general verdict. This is done in an effort to dispute the assertion that the special verdicts, amply supported by the evidence, established all of the elements of the nondisclosure theory except the existence of the duty to disclose, an issue which we respectfully submit it was error to submit to the jury in the first place. First, it is clear that the special verdict controls the general verdict where there is inconsistency, although no inconsistency appears in the instant case. The effect of the rule, as applied to this case, is that inferences may not be drawn from the general verdict which are at variance with the special findings. Thus, where the jury found specially that the policy existed [T. 501], it cannot be inferred from the general verdict that it did not; where the jury found specially that appellant failed to disclose the existence of the policy [T. 502], it cannot be inferred from the general verdict that there was disclosure; where the jury found specially that appellant had no reason to know of the existence of the policy [T. 502], it cannot be inferred from the general verdict that appellant did know.

Secondly, where the error complained of goes to an erroneous charge, the general verdict will not support the assumption that the outcome of the case would have been the same had proper instructions been given—otherwise, no appeal would ever lie on erroneous jury instructions.

The true rule, of course, is that where it appears that the erroneous instructions may have influenced the verdict, the decision below must be reversed. In the instant case, we respectfully submit that the Court must con-

clude, from the answers to the special interrogatories, that the general verdict was necessarily based upon the erroneous instruction.[2]

Moreover, the negative answers to certain of the other interrogatories, relied on so heavily by appellee, have their genesis in the erroneous instructions as to the existence of the duty to disclose. Thus, in Interrogatory No. 9(a), the jury was asked whether appellant had taken action in ignorance of a matter ". . . *which General Motors was required to disclose to Anderson* . . ."; in Interrogatory No. 10B, the jury was asked to give certain answers as to appellant's conduct ". . . *because of a nondisclosure of a matter which General Motors was required to make to Anderson* . . ."

It is clear that the Court, in submitting interrogatories in this form, confirmed its basic error, an error which permeated the entire proceeding below.

Not only did the jury find, but appellee does not deny, the existence of the policy or General Motors' failure to disclose it to Anderson.[3] There is no merit to the suggestion that some species of "waiver" precluding the raising of this issue on appeal arises from the manner in which appellant made its objection to the jury charge bearing upon the materiality of the policy [T. 2400]. In the light of a specific exception taken to the refusal of the Court to instruct as to the existence of the duty

---

[2]While the jury's answers to interrogatories Nos. 3 and 5, coupled with its answer to interrogatory No. 4, leaves the precise date when the policy was formulated in doubt, that fact is of no materiality on the present appeal since it is clear that it was subsequent to November 1, 1951 that the $500,000.00 indebtedness was incurred.

[3]That it cannot be denied is clear from the letter of Harlow H. Curtice, president of General Motors, quoted at pages 23-24 of appellant's Opening Brief, and cited in full at T. 1956-1958, and Mr. Curtice's testimony at pages 129-133 of his deposition.

to disclose as a matter of law, this point is manifestly without substance, but perhaps it should be noted that the portion of the charge to which reference is made by appellee went to the existence of a relationship of trust and confidence *as a matter of fact,* and the concomitant duty inherent in such relationship, and had no reference whatever to the duty of disclosure *raised in law* as to which the proposed jury instruction was refused. In addition, any policy going to the very existence of appellant's business must be material. Finally, there was no instruction as to which appellant could take exception going to the existence of a duty *as a matter of law.* This boot-strap argument defies analysis and one studies it in vain for an indication of what appellee would have had appellant do that it did not do.

In short, it is clear that the only real issue remaining in the light of the special verdicts was whether there was a duty to disclose the policy to appellant. In passing upon this question, the Court is urged to bear in mind that while the appellee is a corporation and an abstract entity in that sense, it functions through, and more to the point, formulates, executes and discloses (or fails to disclose) policy through specific people. The decision that the Anderson distributorship would be terminated when it became more profitable for General Motors to function through zones was formulated by certain key individuals charged with management of the General Motors organization, executed at the direction of these same individuals, and it was these same individuals who failed to disclose the policy to Anderson despite numerous contacts with him during the years in which the policy was in existence.

Nor was appellant a corporate abstraction. In the context of its dealings with General Motors, it, too,

functioned through specific individuals, principally Mr. Anderson himself. Negotiations and conversations were not conducted in a corporate vacuum but rather in an atmosphere of *personal* trust, *personal* friendship and dependence.[4] Having determined the policy, Messrs. Curtice and Hufstader and their subordinates were under a duty to disclose it to Anderson, with whom they had maintained close personal ties over a period of many years, apart from those implicit in the corporate relationship—a relationship in which the same individuals dominated and controlled the major aspects of Anderson's operation.

The precise nature of the relationship and of the domination and control were discussed at length in our Opening Brief at pages 4-22, and we shall have occasion to refer to certain of its aspects in a subsequent portion of this brief. For present purposes, however, a few general observations may be in order. Whatever boilerplate ostensibly descriptive of the relationship may have been contained in the unilateral printed agreements, the operative language of the agreements and the pattern of operation imposed by General Motors upon Anderson rendered the Anderson operation completely subservient to the wishes of the individuals who controlled the policies of General Motors. In so stating, we rely not, as appellee suggests, upon facts in dispute, but upon uncontradicted oral and documentary evidence, since the point which we make on this appeal is that the *uncontroverted* facts establish the relationship from which the duty to disclose the policy flows as a matter of law. At no point in the trial or in its 78-page

---

[4]The Court's attention is invited to Mr. Curtice's statement that he knew of no relationship more interdependent than that with which we are here concerned [Curtice Dep. 200-212], and to Hufstader's statement to the effect that an unusual mutuality existed between the automobile manufacturer and its dealers and distributors [Hufstader Dep. 404-405].

brief did appellee deny the existence of the requirement of 10-day reports, 30-day reports, sales reports, financial reports, facilities reports, service department reports, open point reports, market penetration and price-class analyses, or the frequent "visits," meetings and inspections by General Motors' executives of the Anderson establishment. Appellee ignores them, turning its attention only to a single control device, noted in our Opening Brief, to-wit, the zone manual. Even in this connection, appellee's assertions are unsupportable, as noted hereafter, and the suggestion that this represented a form of benevolent paternalism is plainly specious.

Thus, appellee fails to meet our contention that Anderson was in fact controlled by General Motors.

Nor does appellee respond to the analysis of the legal incidents which necessarily flow from such control. As pointed out in our Opening Brief, that analysis was designed to show the existence of a duty of disclosure *as a matter of law* by virtue of this manufacturer-distributor relationship, just as such a duty would flow as a matter of law where a principal-agent relationship is shown.[5] Instead of addressing itself to this point, appellee throws up a smoke screen tending to obscure the real issues on this appeal. For example, appellee, through the skillful use of a few phrases taken out of context, purports to reduce our position to a syllogism more to its liking than our true position. In creating this strawman, to which its argument reduces itself, appellee warps our argument to a point where appellee has us suggesting that a duty to disclose can exist only where a true confidential relation-

---

[5]The attention of the Court is invited to the fact that many of the elements of a principal-agent relationship are present in the relationship of the parties.

ship is present, notwithstanding that we were at pains in our Opening Brief to point out that a confidential relationship in the technical sense is not the sole basis upon which a duty to disclose could be predicated (Op. Br. 58, and cases cited).

The Court will have noted the tendency of appellee to "muddy the waters" by taking cases cited for one proposition and criticizing them for failing to support other propositions for which they were not cited, and the emphasis upon factual differences between the cases cited and the instant case.[6]

At the same time, appellee ignores the true impact of the cases relied on by appellant. For example, at page 60 of its brief, appellee dismisses *Smyth Sales, Inc. v. Petroleum Heat & Power Co.,* 128 F. 2d 697 (C. C. A. 3, 1942), and *E. H. Taylor, Jr. & Sons v. Julius Levin Co.,* 274 Fed. 275 (C. C. A. 6, 1921), which deal precisely with a manufacturer-distributor relationship. The *Smyth* case involves not a mere generalization as to good faith as suggested by appellee, but precisely the problem presented in the instant case: the duty of disclosure owing from a manufacturer to his distributor. As noted in our Opening Brief, the *Smyth* case holds that the manufacturer-distributor relationship requires full disclosure by

---

[6]For example, appellee seizes upon a group of cases cited solely as indicating the breadth and flexibility of the confidential relationship concept (Opening Brief 58-60) and at pages 57-60 of its brief dismisses them because they do not hold that the relationships therein discussed existed as a matter of law—a point for which the cases were not cited. Appellee further criticizes them as factually distinguishable, although they were not cited as factually similar. Indeed, in light of appellee's persistent emphasis upon immaterial factual distinctions, it may be in order to wonder whether they are suggesting that no case can be in point which involves parties other than Anderson or General Motors, or stated otherwise, that the only case in point is one which would constitute *res judicata* in the premises.

the parties—precisely the position for which we are contending in the present case (Op. Br. 67-68).

In addition, appellee contents itself, in discussing *United States v. General Motors Corporation,* 121 F. 2d 376 (C. C. A. 7, 1941), with the statement, found at pages 61-62 of its brief, to the effect that General Motors Acceptance Corporation is not involved in the instant proceeding, although the case was cited at pages 71-73 of our brief in order to show domination of dealers and distributors under facts and circumstances similar in many respects to those here.

The cavalier treatment accorded by appellee to the thoughtful and frequently cited article of Professor Keaton (Appellee's Br. 54), is typical of its treatment of the many authorities aligned against its position. Not only does appellee ignore the fact that Professor Keaton's statement that the duty of disclosure should be determined by the court as a matter of law was something separate and apart from his suggestion as to the standard to be applied, but appellee does not purport to answer the cogent reasons advanced by the writer in support of his position that the existence of the duty to disclose is properly for determination by the court rather than the jury.

Argument by analogy is a well accepted and persuasive mode of legal reasoning. Thus, it is no answer to our suggested analogy of principal and agent to the instant case for appellee to suggest that Anderson and General Motors were not principal and agent; nor does it answer the analogy of partnership for appellee to deny the existence of a partnership in a technical legal sense, a contention *never* urged by appellant. The cases cited in our Opening Brief in support of these analogies are clearly

relevant to the present case and stand squarely for the principles for which they were cited.

In short, appellee has failed to meet the contentions advanced on this appeal. An examination of the record makes the tactics of the appellee more understandable: appellee could hardly have argued otherwise in the light of the trial concessions made by its own witnesses—the very men who formulated the policy—that General Motors owed Anderson obligations of good faith, under which, in the words of Mr. Hufstader, ". . . as a matter of good faith I should think that it would be necessary and incumbent upon both parties to discuss it on the basis of mutality of interest" [Hufstader Dep. 414].[7]

II.

Appellant's Right to Recovery Is Not Premised on Contract, and the Printed Contracts Do Not Bar Recovery of a Nondisclosure Theory.

In urging the printed contracts as a bar to recovery on a nondisclosure theory, appellee appears to reason as follows:

1. The printed contracts are controlling in the absence of fraud.
2. The jury found no fraud.
3. Therefore, the printed contracts control.

Upon analysis, it will be seen that the foregoing argument, as applied to this case, is specious.

First, as has been heretofore pointed out, the jury's finding that the agreements were not induced by fraud was premised on its determination that there was no duty

---

[7]We have heretofore noted the correction made by Mr. Hufstader to the foregoing testimony prior to the signing of his deposition, wherein he added the phrase ". . . in accordance with the terms of the agreement between them." (Opening Brief 21.)

of disclosure. Had the jury been properly instructed, a finding of fraud on the part of appellee would have followed as a matter of course. In short, in premising its argument upon the jury's finding that there was no fraud, appellee seeks comfort from the very error complained of by appellant, namely the failure of the trial court properly to charge the jury with respect to nondisclosure.

Furthermore, as was pointed out in our Opening Brief, appellant's recovery is sought not on any contractual rights *per se,* but upon the violation of the duty of disclosure arising out of the relationship of the parties.

With the foregoing in mind, it is clear that even had Anderson been aware of any legal right of General Motors to terminate the distributorship under the agreements, he would be no less entitled to recovery where the nondisclosure of the policy was shown. In this regard, it should once more be emphasized that the jury expressly found that Anderson was justifiably ignorant of the policy and, of course, appellee itself nowhere disputes the jury's finding in this regard.

Finally, appellee argues that the fact that appellant did not make specific objection to the charge in regard to the effect of the printed dealership agreement weakens the position of appellant on appeal. This argument is without merit because the trial court itself expressly recognized in its charge that the printed contract would not be controlling in the case of fraudulent nondisclosure [T. 2414-2415]. Appellant did all that it was in its power to do by requesting the charge as to the existence of the duty to disclose, which the Court erroneously refused to give.

III.

The Trial Court Erred in Taking Appellant's Right to Recovery for Nash's 1947 Misrepresentations From the Jury.

The response of appellee to Specification of Error No. II. briefed at pages 82-83 of Appellant's Brief, appears to be that the jury found adversely to our position that a claim for relief based on fraud could be premised on such misrepresentations. This position is clearly untenable since the Court expressly precluded the jury from considering the 1947 misrepresentations as an independent basis for recovery [T. 1573-1574]. This contention having been withdrawn from jury consideration, appellee's argument that the general verdict resolves the issue in its favor is without support.

Appellee's reliance upon the printed contracts as obviating the effect of the error is likewise untenable, for as heretofore pointed out (see II. *supra*), the contracts are not proof against a claim of fraud. Again, appellee has failed to meet the thrust of our contentions, namely that the invasion by the Court of the jury's function with respect to the Nash misrepresentations constitutes, in itself, a sufficient basis for reversing the judgment below.[8]

IV.

The Trial Court Erred in Making the Nunc Pro Tunc Order as to the Costs of the Transcript.

In our Opening Brief, at pages 90-92, we pointed out wherein the purported *nunc pro tunc* order as to the cost of the reporter's transcript was made in violation of the

---

[8]Appellee's hyper-technical suggestion that the point is lost to appellant by failure to except is met by the following statement of counsel [T. 1573] which immediately followed the ruling of the Court on the point: "Mr. Horowitz: We take an exception, your Honor."

provisions of Local Rule 56(f), which restricts the court, in considering a motion to retax costs, to ". . . the same papers and evidence used before the clerk" [T. 555]. Instead of answering our contention in this regard—which we respectfully submit is unanswerable—appellee contents itself with a quotation of certain of the remarks of the Court made after the conclusion of the trial as to the supposed need for the transcript, but fails to cite a single authority or suggest a single argument to sustain the making of the order complained of. *The remarks quoted were not ". . . used before the Clerk."*

V.
It Is Appellee Rather Than Appellant That Misstates the Facts.

To this point in this brief, our efforts have been directed toward once more placing the appeal in proper focus and meeting appellee's attempt to obscure the basic issues with alleged conflicts in the evidence. In this portion of the brief, we shall comment briefly upon the factual inaccuracies of the appellee and its claim that we have misstated the facts.

At the outset, it should be noted that appellee's "Statement of the Facts" ignores uncontradicted testimony of appellant's witnesses and the testimony of appellee's own witnesses which was unfavorable to its case, and concentrates instead on isolated statements taken from context and upon facts of no materiality whatever to any issue involved on the appeal. In many instances where appellee recites facts, the recitation is patently and demonstrably inaccurate.

For example:

1. *The Friedlander letter* [Pltf. Ex. 81; T. 1071]: At page 37 of its brief, appellee states that the Fried-

lander letter was admitted into evidence as testing Mr. Anderson's credibility. The record demonstrates that the letter was offered by appellant and received in evidence by the Court over the objection of appellee [T. 1069]. It would be unusual indeed for a party to introduce evidence for the purpose of testing his own credibility, and it is clear from the record that the letter was offered and received because of its bearing on the existence of the policy and the date of Anderson's discovery thereof.

2. *Circumstances of termination:* In an effort to justify the termination of the distributorship, appellee paints a picture which does not square with the testimony of Messrs. Curtice and Hufstader as summarized in our Opening Brief (Op. Br. 22-26).[9]

3. *The existence of the policy:* The lengthy exposition of the history of automobile distribution, found at pages 4-6 of appellee's brief, appears to serve no purpose whatever in view of the undisputed finding of the jury that the policy existed and was unknown to Anderson, and that Anderson was justifiably ignorant of it.

---

[9]In Mr. Curtice's letter of June 10, 1954, plaintiff's Exhibit 8 [T. 658-660], written *ante litem motam,* he stated: "I am quite familiar with the policy of Buick Motor Division to the effect that it should handle its wholesale distribution through divisional zone offices directly with its dealers, and the program for carrying out that policy which neared completion in 1953 with the discontinuance of the Buick distributorships and the replacement thereof with zone operations in the Pacific Northwest, since *I, as general manager of Buick Motor Division, approved that policy and actively participated in the effectuation of it over a period of years in different sections of the country. . . .*" (Our emphasis.) In his deposition, read into the record, Mr. Curtice testified that the first step in the execution of the policy was the elimination of Noyes in 1944, the second step was the elimination of Howard in 1947 and the third step was the elimination of the Northwest distributors, including appellant, in 1953 [Curtice Dep. 145-146]. This, together with the testimony of Mr. Hufstader, can hardly be squared with appellee's rationalization found on page 12 of its brief.

4. *Profitableness of appellant's distributorship:* Appellee makes much of the fact that appellant's operation was financially successful, a proposition with which appellant does not quarrel. That appellant's operation was profitable would hardly entitle General Motors to ignore its obligation to act in good faith. Indeed, the very profitableness of the Anderson operation prior to termination and its complete ruin after termination, is convincing evidence of the substantial damage sustained as a result of the fraud.

Moreover, the suggestion that the wholesale operation functioned at a loss is completely without merit, the figures set forth at page 11 of Appellee's Brief being those furnished by its own expert witness, who, on cross-examination, made it clear that they had not been computed in accordance with sound accounting principles, but rather in accordance with the instructions of counsel.[10]

---

[10]Appellee's expert was Robert L. Aiken, C.P.A., Seattle resident partner for Lybrand, Ross Bros. & Montgomery. On his direct examination, he testified consistent with the statements of appellee, found at page 11 of its brief. The question of wholesale profit was explored on cross-examination, commencing at page 1802 of the transcript and with reference to defendant's Exhibit 49, quoted at page 11 of Appellee's Brief, the following colloquy took place:

"Q. Now, you had the correct picture before you when you prepared these exhibits A-45 to A-50, didn't you? A. Yes, we did.

Q. And you did not use them? A. That's right.

The Court: In what year was this $50,000 adjustment made? A. I believe it was in 1951.

Q. (By Mr. Kadison): Is it sound accounting practice, Mr. Aiken, to use figures which you know are erroneous when the correct figures are in your possession in the preparation of analyses of books and records?

(Testimony of Robert L. Aiken.)

A. It depends on the purpose for which they are being prepared.

Q. What was the purpose for which these were prepared? A. This court examination."

In addition, Mr. Aiken testified that he attributed no service department income to the wholesale operation [T. 1815], although he made no examination to justify his conclusion that service profits were related solely to retail [T. 1817]. He testified that he attributed no warehousing income to wholesale [T. 1818] although depreciation of the warehouse was charged against wholesale income [T. 1819]. He testified that he did not credit delivery receipts to wholesale [T. 1821], but charged delivery expense to wholesale. The Court is most respectfully urged to study the recross-examination of this witness found at pages 1844-1850 of the transcript.

Of course, it must be borne in mind that this issue, introduced into the appeal by appellee, goes to damages, a matter not before the Court on the appeal.

5. *"Negotiation" of the printed agreements:* Contrary to appellee's assertion found at pages 29-30 of its brief to the effect that the contracts were freely negotiated—made, we respectfully suggest, somewhat with tongue in cheek—the uncontradicted testimony of their own witness, Mr. Hufstader, reveals that they were in fact unilaterally prepared by General Motors and presented to Anderson on a "take it or leave it" basis [T. 1954-1955].

6. *Acknowledgement by General Motors of obligation to deal in good faith:* Among the more apparent omissions in appellee's brief is the lack of reference to the testimony of Messrs. Curtice and Hufstader, *who conceded that General Motors had an obligation to deal with Anderson in good faith* [Curtice Dep. 213-214, 215-217, 236; Hufstader Dep. 404-405, 408-411, 456].

Appellee has failed to demonstrate a single instance in which appellant has misstated the facts, notwithstanding its protestations to the contrary.

There is ample transcript support for every factual statement made by appellant.[11]

For example:

1. *General Motors' control of Anderson:* In attempting to meet our claim of control, appellee completely ignores the discussion of the control devices employed by it (Op. Br. 8-21, 71-77). While appellee does comment briefly upon one of these devices, namely the "zone manual," its assertion that this was not a control device is contrary to the testimony of Mr. Hufstader [Hufstader Dep. 387].

2. *General Motors' pressure for increased facilities:* In denying that General Motors exerted pressure on Anderson to expand facilities, appellee ignores a mass of evidence in order to select one self-serving sentence out of context (Appellee's Br. 16-17). That pressure was in fact exerted is readily apparent from the testimony of General Motors officials as well as the uncontradicted testimony of Anderson [T. 1001-1003, 2047-2048; Hufstader Dep. 319-321, 328-329, and other passages cited at pages 16-17 of Appellant's Op. Br.).

3. *The proposed sale of the Main plant:* In asserting that Anderson's decision not to sell its main

[11]Appellee's practice of taking several transcript references at the end of a passage in appellant's brief, which references as a group support the entire passage, and asserting that a particular reference does not support a particular portion of the passage, does not deprive the factual statement of support. Needless to say, it is somewhat surprising to find appellee thus attempting to exploit our use of a form of reference occasionally adopted in order to present a more concise and intelligible picture of the facts.

plant was not attributable in any way to General Motors' "advice" on the subject, appellee again ignores uncontradicted testimony showing Anderson's recognition of the need to consult General Motors on this matter, as reflected by the testimony of a disinterested witness [T. 1723-1726].

4. *Working capital:* It does not meet appellant's contention that General Motors exerted pressure upon Anderson to increase its working capital for appellee to point to the printed contract (Appellee's Br. 21-22). As heretofore noted, the contract itself created many of the instruments of control used by General Motors and it was in part through the contract that such pressure was exerted. The issue is not whether General Motors was correct in its assessment of the Anderson working capital needs but rather whether, after so assessing them, General Motors exerted pressure to convert its assessment into fact. That the domination by General Motors may have taken the form of benevolent paternalism did not render General Motors any less dominant or lessen its obligation to act in good faith toward Anderson. Indeed, General Motors' assumption of such a paternalistic attitude with respect to Anderson would itself be sufficient to create a duty to disclose as a matter of law. In any event, the record is replete with uncontradicted evidence of working capital pressure, both documentary and in the form of testimony from appellee's own witnesses (citations collected in Appellant's Op. Br. 14-16).

5. *The effect of the $500,000.00 mortgage loan on working capital:* General Motors persists in insisting that the effect of the $500,000.00 mortgage

loan following the November, 1951 conference in San Francisco did not increase working capital, notwithstanding the testimony of Mr. Aiken, General Motors' expert accounting witness, to the contrary. Perhaps the point can finally be laid at rest by quoting Mr. Aiken as follows [T. 1798]:

> "Q. So that on that date (the date of the loan) the working capital was increased by $500,000.00, was it not? A. Yes, that's right."

6. *National Automobile Dealers Association:* In suggesting that Mr. Hufstader's demand that Anderson not seek re-election to the presidency of the National Automobile Dealers Association was a mere request, appellee ignores the real tenor of the demand as revealed by Mr. Hufstader's own testimony. This becomes apparent when the italics in the passage quoted by appellee are placed properly [T. 1864], ". . . the second item that I wanted to discuss with him was to *ask him very definitely* not to stand for re-election . . ."

Moreover, it should perhaps be re-emphasized that the question on this appeal is not what was best for Anderson but the control over Anderson exercised by General Motors. Whether that control was benevolent or malevolent is of no moment: its mere existence establishes a relationship from which a duty to disclose flows as a matter of law.

7. *Partners in Progress:* The emphasis accorded by us to President Curtice's use of the "partners in progress" concept does not spring, as appellee would suggest (Appellee's Br. 27-28) from any argument on our part that a technical legal partnership existed and, therefore, the assertion by appellee that

there was in fact no technical partnership is quite beside the point. We used the concept, as did Mr. Curtice, as evidence of the character of the relationship between the parties during the period of the distributorship. In stating that Mr. Curtice used the term "as a businessman," we assume that appellee is not implying that his statement was untrue; rather, it seems clear that in speaking of a partnership "in a business sense," Mr. Curtice was emphasizing the closeness and community of interest which characterized the relationship of General Motors, its dealers and distributors.

8. *Relative size of the parties:* The relative size of the parties, which is hardly open to dispute, may not properly be dismissed in the cavalier fashion adopted by appellee, for as pointed out in our Opening Brief (Op. Br. 22), it has an important bearing upon the question of control and dominance which characterized the relationship of the parties from which the duty to disclose flows as a matter of law.

9. *Reliance by Anderson and resulting damage:* In urging that Anderson did not in fact take action as a result of the nondisclosure by General Motors of the policy, appellee again misstates the effect of the jury's verdict (Appellee's Br. 32-34). There was nothing in the verdict or in the answers to the special interrogatories tending to support appellee's assertion that Anderson did not take action as a result of the nondisclosure, or that he was not substantially damaged as a result thereof.

Moreover, a review of the uncontradicted testimony in the trial court demonstrates complete support for the contentions of appellant in this regard

[T. 956, 957, 1027-1028, 1037-1038, 1062-1063, 1633-1634]. Thus, the record clearly establishes that the Anderson assets were one-purpose assets in the sense that they could not be used profitably for other automobile lines or other purposes. This was demonstrated by Anderson's signal lack of success in so using them following termination. Moreover, whatever relevance General Motors' arguments in this respect may have on future questions relating to mitigation of damages, they are obviously beside the point on the present appeal.

Insofar as appellee asserts that Anderson was precluded by the terms of the printed contracts from relying upon the nondisclosure, it has been demonstrated elsewhere in this brief that the contracts did not have this effect (Point II, *supra*). As we pointed out, we are not here relying on any agreement at variance with the written contracts, but assert rather that Anderson would have acted otherwise than he did had he known of the existence of the policy.

Finally, insofar as General Motors asserts that the $500,000.00 mortgage loan was not made for use in the distributorship, we invite the Court's attention to the fact that it was a 15-year borrowing, which would never have been made had Anderson known that the distributorship, which formed the keystone of his operation, would be terminated months later.

10. *Date of discovery of fraud:* The trial court permitted the amending of the Complaint to correct an obvious error in alleging the date of the discovery by Anderson of the policy. In view of the liberal rules respecting amendments to pleadings, there does not appear to be any basis for appellee's position.

11. *The Packard and De Soto-Plymouth distributorships:* Appellee suggests (Appellee's Br. 14) that Anderson undertook negotiations for the De Soto-Plymouth distributorship prior to the effective date of the General Motors termination. It is clear from the record that negotiations looking toward this distributorship were not commenced until after the effective date of termination [T. 1075, 1296].

12. *Moneys paid appellant following termination:* The $145,112.68 paid appellant following termination and referred to, in passing (though without reference), by appellee, at page 14 of its brief, were moneys paid by way of purchase price from General Motors to Anderson for some of the parts which Anderson carried in inventory. General Motors refused to purchase other parts [T. 2153-2154].

Conclusion.

The trial court erred in rejecting Anderson's contention that General Motors owed a duty as a matter of law to disclose the policy to terminate the distributorship. This was argued at length in the Opening Brief. Appellee has completely failed to address itself to the merits of this basic issue on the appeal, and, we submit, has thereby implicitly conceded the correctness of our position.

Accordingly, it is respectfully submitted that the judgment below should be reversed.

Respectfully submitted,

Pacht, Ross, Warne & Bernhard,
Stuart L. Kadison,
Harvey M. Grossman,
Preston, Thorgrimson & Horowitz,
Charles Horowitz,
Attorneys for Appellant.